

**The American Association of Exporters and Importers  
American Council on International Personnel  
The Association For Manufacturing Technology  
The Coalition for Employment Through Exports  
Computer & Communications Industry Association  
Electronic Design Automation Consortium  
Emergency Committee for American  
The National Council on International Trade Development  
National Defense Industrial Association  
The National Foreign Trade Council  
The Satellite Industry Association  
Semiconductor Equipment and Materials International  
Semiconductor Industry Association  
TechAmerica  
The U.S. Chamber of Commerce**

January 19, 2010

General James Jones  
National Security Advisor  
The White House  
1600 Pennsylvania Ave. N.W.  
Washington, DC 20500

The Honorable Lawrence Summers  
Director, National Economic Council  
The White House  
1600 Pennsylvania Ave. N.W.  
Washington, DC 20500

Dear General Jones and Dr. Summers,

On behalf of the Export Control Practitioners Group, we would like to commend the Administration for initiating a broad review of the current export control system. We understand the complexity of the process, and we look forward to working with you as it moves forward. Please find attached our paper that lays out practical recommendations that focus on reform that is simple, transparent, and efficient.

The Export Control Practitioners Group has been active for the past decade. It is a diverse group consisting of the signed associations, along with businesses, law firms, and practitioners well-versed in all aspects of the export control process from both the industry and government side. Since the Administration's announcement, the group has focused on preparing these recommendations in order to assist the reform process in achieving its goals of a streamlined mechanism with higher walls around fewer items.

The world has changed significantly since the enactment of the first Export Administration Act in 1949, and while we continue to support strong actions to protect our security, the system badly needs reforms that will enhance our security while retaining America's competitive lead in high technology. We hope our paper will provide you with guidance as you move forward.

Sincerely,

The Signed Associations

# EXPORT CONTROL REVIEW PRINCIPLES AND RECOMMENDATIONS

## Overview

Export control reform should focus on simplicity, transparency, and efficiency. Our recommendations focus on process and policy changes to achieve those goals as well as some more substantive recommendations for modernizing the current system. Reforms should focus on improving the working relationships among the agencies through process change and agreement on fundamental definitions and decision-making criteria. We do not support large-scale institutional changes (*i.e.*, a single agency) because we believe they would delay if not postpone indefinitely the real reforms that are needed.

Our Guiding Principles include:

- **Pursue reform with a government/private sector partnership at the center.** A cooperative effort, based on a trusted partnership, can lead to more effective controls and transparency for government regulators and allow greater freedom of action for industry.
- **Ensure accountability in the decision-making process.** Over time, a combination of lapsed legal authority, sparse judicial review, disagreements over standards and definitions, inconsistent Congressional oversight, and missed deadlines with few if any consequences has produced a significant accountability problem that adds to the inefficiency and complexity of the system.
- **Control lists, thresholds, and parameters must keep pace with advances in critical technologies.** Annual reviews with deadlines and rationales by subject matter experts in government and industry are needed to ensure export controls remain relevant and current with changes in products and technologies.
- **Controls must take into account the globalization of research and development of new technologies.** Foreign educational advances and the spread of information via the internet have revolutionized global science and technology capabilities.
- **Export controls must be multilateral to be effective in denying controlled technology to our adversaries.** The United States no longer has a monopoly on high technology and cannot effectively control trade with unilateral controls that only adversely affect U.S. companies.
- **A strong technology industrial base is critical to maintaining a strong national defense.** U.S. companies need to remain competitive globally and able to maintain leading edge research and development programs in advanced technologies.

## Specific Proposals

### **A. Structure**

We support:

- 1) Maintaining the overall interagency structure, but implementing more interagency cooperation, including physical collocation where possible.

- 2) With one exception (*see* Accountability section), not adding additional layers of bureaucracy, including a single point of entry at the front end of the process or an overarching supervisory structure.
- 3) Reorganizing DOD so that DTSA reports to the Under Secretary for Acquisition, Technology and Logistics.

## **B. Commodity Jurisdiction**

Difficulties in and inter-agency conflicts over deciding which licensing system applies to a particular product, service, or technology and determining the precise classification of an item have plagued the system for years and are a significant source of delays in decision, implementation, and exporter confusion. We support:

- 1) Establishing the National Security Advisor as the final decision maker to resolve conflicting agency claims. The Advisor should make the rationale for his or her decisions available to the public. The export control agencies should implement these decisions in amendments to the USML and the CCL.
- 2) Better interagency coordination, including collocation of technical experts, to facilitate mutual understanding and interagency communication, promote information sharing and transparency. Establish a parallel support process for consultations among the interagency teams, as well as technical and business development resources, to provide regular updates on global trends in technology, business, marketing, *etc.* as a guide to place new technologies on the lists.
- 3) Upgrading the technical and engineering expertise of BIS, and ensuring that direct access to military and other government labs and technical support units is made available to BIS.
- 4) Restructuring the USML to specify entries from the International Munitions List, entries from the international dual use lists, and a separate category for US unilateral controls to clarify when the United States is choosing to follow international protocol and when it is choosing to deviate from it.
- 5) Moving items that do not belong on the USML/ITAR to the CCL at an appropriate level of control by July 1, 2010. In doing so, the National Security Advisor should follow the guidance of multilateral agreements and put Wassenaar Munitions List items on the USML, place multilaterally controlled dual use items on the CCL, and subject items not controlled by a multilateral regime or treaty to the EAR. The Advisor should document those items the Executive Branch chooses to control unilaterally.
- 6) Completing the definitions review exercise in the Defense Trade Advisory Group (DTAG) to rationalize and standardize the meaning of terms in the ITAR by March 1, 2010, and then having DDTC complete its review of that work by July 1, 2010.

- 7) Implementing by March 1, 2010 a uniform, common sense and objective definition of what is a defense article/end item, which focuses on core military functionality, including removing the current design intent standard of §120.3 of the ITAR and replacing it with a more suitable standard reflecting a policy of designating items for the USML that are either multilaterally controlled as munitions or otherwise support U.S. core military capabilities.
- 8) Providing a more comprehensive and documented response to the applicant of the rationale for a jurisdiction determinations, to include the USML Category Number or CCL ECCN.
- 9) Implement decisions to move a product or technology from ITAR control to EAR control within 30 days of the decision.

### **C. Control List Review and Reduction**

Control Lists have not undergone comprehensive overhaul since the advent of the Wassenaar Arrangement in 1994. This failure, coupled with increasingly short life cycles for high technology products, has left a list that is seriously outdated. In keeping with the oft-stated principle (by the last four administrations) of “higher fences around fewer items,” we support:

- 1) Regular annual reviews with a “default to decontrol” provision that would require items to be removed from the list in the absence of a timely, documented, genuine review and justification for retaining controls.
- 2) Starting a comprehensive review of the dual use control list with the Wassenaar Very Sensitive List. Additions to the list could be made only after specifically defining a) the purpose of the control, b) the economic impact of the control, c) the military utility of the controlled items, and d) the feasibility of effective control capability (*e.g.*, foreign availability, indigenous capability, or other controllability). The reasons for additions to the list should be clearly specified.
- 3) Proposing to the Wassenaar parties that they make the finished revised list their dual use list. The US should clearly identify as unilateral any items the Wassenaar parties do not agree to put on their list and subject to similar licensing policy.
- 4) Increasing transparency of the reviews both through clear public statements about how they will be conducted and by making results and rationales available to the Congress and the public in a timely fashion.
- 5) Continued involvement of Technical Advisory Committees in list reviews, along with other appropriate public sources, within the “default to control” framework of recommendation #1 previously discussed.
- 6) Creation of a special mechanism to automatically decontrol certain items based on their anticipated life cycle and the forecast arrival of the next generation.

- 7) Acquisition by the government of more technical expertise for conducting its reviews by tapping resources at NIST and the government-owned but privately operated laboratories.
- 8) With respect to munitions, creating additional categories within the State Department licensing system such as a No License Required category or other similar measures that would permit some lower level items to be exported more freely without being removed from controls entirely.

#### **D. Accountability**

To promote accountability in the system consistent with our second guiding principle, we support:

- 1) Creation of an appeals process, modeled after that proposed in the NAS study, *Fortress America*, which would provide for review by independent officials of classification or jurisdiction decisions or technical and definitional decisions made by the agencies. Policy decisions, such as the decision to approve or deny a license, would not be eligible for review. Private firms should be allowed to initiate and participate in such appeals.

#### **E. Foreign Availability**

The process for decontrolling items in light of their foreign availability, a concept in existing law for national security controlled items, has never functioned well and has been the subject of numerous proposals for improvement over the past 20 years. To make the concept viable, we support:

- 1) Basing the analysis on “controllability” -- whether the item is available in sufficient quantity and comparable quality so as to render attempts to control ineffective in achieving their intended purpose.
- 2) Greater transparency of process, specifically that if foreign availability is determined to exist for an item but the President decides to maintain controls regardless, it should clearly be labeled as a unilateral control, and the President would have to renew his determination pursuant to an automatic foreign availability review annually.
- 3) Requiring the Administration to take steps to obtain multilateral controls on an item where the United States retains controls despite its foreign availability.

#### **F. Licensing Issues**

Procedures for licenses, license agreements, exemptions, and exceptions need to reflect the faster cycle time for doing business globally and should not be an impediment for U.S. companies or a

source of selection discrimination. Overly complex U.S. export authorization procedures can cause needless delays, which can adversely affect transaction outcomes. To improve the current export authorization processes, we support:

With respect to State Department, Directorate of Defense Trade Controls (DDTC) -- ITAR:

- 1) Providing a more efficient way to develop and execute Technical Assistance Agreements (TAAs) and Manufacturing License Agreements (MLAs) by revising DDTC information requirement to conform to the DSP-5 electronic licensing format and allowing foreign licensees to use a “rolling signature” procedure.
- 2) Simplifying the use of Exemptions by locating all of them in one section of the ITAR and combining similar Exemptions for transactions with parties in destinations that pose the least risk to national security, such as exports by primes and subcontractors under a U.S. government contract, by or to U.S. persons that do not involve foreign persons, and to NATO and NATO member governments.
- 3) Allowing all exemptions to apply to defense articles, technical data, and defense services.
- 4) Streamlining program licensing to reduce delays in US defense acquisition and promote collaboration with allies consistent with the principles reflected in the US-UK and US-Australia Treaties.
- 5) Creating a rule to exempt from control reexports (except for items posing an immediate threat to our national security) with less than 10% (by dollar value) U.S.-origin ITAR controlled content to relieve pressure to “design out” U.S.-content, which results in diminution of the U.S. ability to control such reexports.

With respect to Commerce Department, Bureau of Industry and Security (BIS) -- EAR:

- 6) Resuming the practice of agency delegations of authority on license reviews.
- 7) Expanding the Validated End-User (VEU) program to include additional countries and additional end users.
- 8) Completing action on the Intra-Company Transfer Rule ordered by President Bush in January 2008.
- 9) Implementing Secretary Locke’s proposal eliminating licensing requirements for NATO and other allied countries.
- 10) Considering preferential treatment for trusted exporters.
- 11) Standardizing licensing conditions.
- 12) Broadening exemptions for mail and telephone communication to include instant communication technologies, personal communications software and web services.

With respect to Treasury Department, Office of Foreign Assets Control (OFAC) -- FACR:

- 13) Reducing the license review time for OFAC licenses to 30 calendar days and assuring adequate resources at OFAC and State to achieve the reduced review time.

## **G. Enforcement**

The best approach to enforcement is to reduce the overall scope of controls, improve transparency, and clarify definitions. That will facilitate compliance and allow enforcement officials to concentrate their resources on the most serious cases and most important items and technologies. To that end, we support reforms that would provide for:

- 1) Graduated civil penalties based on the principle that violations resulting from mistake or inadvertent conduct should not be subject to the most severe penalties. The civil penalty structure should draw meaningful distinctions among violations resulting from willful or knowing conduct, gross negligence, negligence, or strict liability. There should be tiers of penalties, with caps on the amounts that may be assessed based on levels of culpability, and significant mitigation of penalties should be afforded in cases where a company makes a Voluntary Self Disclosure (VSD), has an effective compliance program and institutes corrective actions to avoid future violations. The use of warning letters should be encouraged in VSD cases and cases involving minimal violations to encourage the submission of VSDs and improve compliance practices.
- 2) In cases where there is a need for a Section 764.5(f) approval to service items exported in violation of the EAR, an automatic approval in most circumstances once the VSD is filed.
- 3) Encouraging enforcement agencies to improve procedures for sharing information to facilitate global settlements of prosecution and penalty cases, when parties subject to prosecution/penalties are interested in that outcome.
- 4) Periodic agency review, update and enhancement of enforcement policies and guidelines, to establish uniformity in the application of those policies/ guidelines, particularly with respect to agency handling of VSDs.

## **H. Deemed Exports and Intracompany Transfers**

The recent NAS study, *Beyond Fortress America*, identified substantial problems with the U.S. approach to technology controls, including deemed exports. These controls are often unilateral in the way they are executed and impose a significant and often unnecessary burden on the global operations of U.S. companies. Controls on deemed exports and intracompany transfers must be updated to reflect a post-Cold War environment, where auditable company internal control programs are an established part of globalized U.S. business.

To that end, we support:

- 1) **Deemed Exports.** Limiting deemed export licensing requirements to sensitive, multilaterally controlled *technology* only (*e.g.*, the Wassenaar Very Sensitive List, and the multilateral proliferation lists).
- 2) **Intracompany Transfers.** Providing Trusted Party License Exceptions for dual-use intra-company transfers to and among non-embargoed destinations.
- 3) Granting two distinct intra-enterprise license exceptions for a) exports, reexports, and retransfers of software and technology, including deemed exports; and b) production and test equipment, parts, and products for stock, to firms that register with licensing authorities, providing the name, address, and background of the recipient; and commit to specific internal control practices specific to each License Exception and outlined in regulation, such as the use of non-disclosure agreements and training, or basic physical security measures. Authority to use these License Exceptions would become effective 30 days after date of registration.

## **I. Commercial Communication Satellites**

We support:

Urging Congress to adopt legislation restoring Executive Branch authority to determine licensing jurisdiction for commercial satellites and associated items and technologies. Once enacted into law, moving expeditiously to remove such items from the USML.

## **J. Encryption Reform**

Major reform in this area has not occurred since 1999. There have been some updates in subsequent years but the principal framework (product registration) is largely in place. This approach is outdated as encryption has become ubiquitous in most software and some hardware products. To modernize the treatment of encryption we support:

- 1) Removing encryption controls on products that do not have cryptography as their core function;
- 2) Removing review requirements from mass-market and other commodity products and components, consistent with the practice of U.S. allies;
- 3) Ensuring mass-market treatment for components that are designed for use in mass-market products or that are otherwise widely available;
- 4) Eliminating post-export reporting requirements;
- 5) Lifting unilateral controls in general, such as those on encryption used in connection with Open Cryptographic Interfaces;
- 6) Eliminating controls on products utilizing only publicly available software.



## **K. End-user and End-Use Screening Requirements**

U.S. companies that directly export, reexport or retransfer to overseas customers bear the burden of screening each transaction against a multi-agency list of over 27,000 entities as well as for proliferation end-use. While positive screening procedures are not specified in the regulations, they are clearly an expectation of due diligence by enforcement authorities in some industry sectors considered "high-technology," regardless of control levels. In other sectors (*e.g.*, food and agricultural products), by contrast, general end-use and end-user restrictions are inconsistently enforced, if they are enforced at all. This leads to burdensome and expensive control programs for some industries that do not advance the objectives of either the controls or the agencies that establish the general catch-all requirements, and it makes some leading edge business models (*e.g.*, direct electronic distribution of mass-market software), difficult or impossible due to the delays and logistics involved.

To address this problem, we support:

1. Linking end-use/end-user controls and screening requirements (*e.g.*, expectations of due diligence) imposed by OFAC, BIS and the State Department to specific control levels and transaction categories
2. Consolidating the various end-user lists maintained by the various agencies (*e.g.*, DDTC Debarred List, BIS Entity List, OFAC Specially Designated Nationals List, *etc.*) into one centralized list, including names and data in the end users' native languages, to afford easier access by exporters and other interested parties.
3. Directing the intelligence community to provide Treasury, Commerce, and State greater detail regarding designated parties, including age, birth date, nationality, identification numbers, address, and other identifying information.